2017 IL App (4th) 141047-U

NO. 4-14-1047

FILED
January 13, 2017
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
LYNNTEZ J. HOLT,	)	No. 13CF1517
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas J. Difanis,
	)	Judge Presiding.

PRESIDING JUSTICE TURNER delivered the judgment of the court.
Justices Holder White and Appleton concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed in part, finding (1) the State's evidence proved defendant guilty of aggravated battery with a firearm beyond a reasonable doubt, (2) the trial court did not fail to address his posttrial claims of ineffective assistance of counsel, and (3) the court did not err in imposing a 20-year sentence. We vacated defendant's conviction for aggravated discharge of a firearm and remanded for an amended sentencing judgment.

¶ 2 In August 2014, a jury found defendant, Lynntez J. Holt, guilty of aggravated discharge of a firearm and aggravated battery with a firearm. In October 2014, the trial court sentenced defendant to concurrent prison terms of 20 years on the offense of aggravated battery with a firearm and 15 years on the offense of aggravated discharge of a firearm.

¶ 3 On appeal, defendant argues (1) the State's evidence failed to prove him guilty of aggravated battery with a firearm, (2) the trial court failed to address his posttrial claims of ineffective assistance of counsel, (3) his 20-year sentence is excessive, and (4) his conviction for

aggravated discharge of a firearm must be vacated. We affirm in part, vacate in part, and remand with directions.

¶ 4 I. BACKGROUND

¶ 5 In September 2013, the State charged defendant by information with single counts of attempt (first degree murder) (count I) (720 ILCS 5/8-4(a) (West 2012)), aggravated discharge of a firearm (count II) (720 ILCS 5/24-1.2(a)(2) (West 2012)), and aggravated unlawful use of a weapon (count III) (720 ILCS 5/24-1.6 (West 2012)). In count I, the State alleged defendant committed the offense of attempt (first degree murder) in that he, with the intent to commit the offense of first degree murder (720 ILCS 5/9-1(a)(1) (West 2012)), took a substantial step toward the commission of that offense, without lawful justification and with the intent to kill Hymme Hogue, by pointing a firearm at or near Hogue's head and discharging the firearm. In count II, the State alleged defendant committed the offense of aggravated discharge of a firearm in that he knowingly discharged the firearm in the direction of Hogue. Prior to trial, the State dismissed count III. In August 2014, the State charged defendant with one count of aggravated battery with a firearm (count IV) (720 ILCS 5/12-3.05(e)(1), (h) (West 2012)), alleging he, in committing a battery, knowingly and by means of the discharge of a firearm caused injury to Hogue in that he discharged the firearm in close proximity to Hogue causing injury. Defendant pleaded not guilty.

¶ 6 In August 2014, defendant's jury trial commenced. Hymme Hogue testified he lived in Indianapolis, Indiana. At some point in time, Hogue came into possession of a residence at 210 East Park Street in Champaign, Illinois. He rented the home to Jerry Exum in 2013. After Exum "started being delinquent with his payments" and was "really disrespecting" Hogue's sister, Hogue told Exum he had to find a new place to live.

¶ 7 On September 1, 2013, Hogue traveled to Champaign to evict Exum and take possession of the property. In the early afternoon, Hogue changed the locks and inventoried the items in the house. Once completed, Hogue spent time socializing with friends and family. In the evening, Hogue met with Theresa Burnett, an old friend, at the house. While he and Burnett were "mak[ing] out a little bit" after midnight, Hogue saw someone looking in the window and then heard knocking at the door. Hogue answered the door and found defendant and Ammon Gray, both of whom he knew. Hogue let them inside, and they walked into the kitchen. Defendant told Hogue that some of the items in the house, including a window fan, belonged to him. Hogue told him he had to wait for Exum because Hogue was unsure of the ownership of the property. Defendant started "getting frustrated and aggressive." Hogue stated defendant then "went into his belt and pulled out a weapon." Hogue "kind of rushed him a little bit, tried to block him, and the weapon went off." Hogue stated defendant "shot me in the head" and he started "bleeding down the face." He described it as a "laceration" going across his forehead. Hogue then ran and hid in the house.

¶ 8 Theresa Burnett testified she was with Hogue when he heard a knock at the door. She later heard Hogue and another man arguing about a fan. She then heard a gunshot. Thereafter, Burnett observed defendant carrying a gun. He picked up a fan and walked out. Burnett then saw Hogue with "blood running down his face." Burnett told Hogue she did not want to be involved, so she left. She eventually talked to the police and identified defendant in a photo array.

¶ 9 Champaign police officer Ashley Petkunas testified she responded to the call of a shooting and found Hogue bleeding from the forehead. Champaign police sergeant Aaron Lack testified officers found "a gouge in the woodwork from possibly a fired bullet." Lack also found

a pistol on top of a china cabinet. Lack testified a muzzle blast in close proximity to a person could cause a laceration. He also stated a gun's recoil in close proximity to a person could cause injury.

¶ 10 Defendant did not testify. Following closing arguments and two jury questions, the jury found defendant guilty of aggravated discharge of a firearm and aggravated battery with a firearm but not guilty of attempt (first degree murder).

¶ 11 On September 5, 2014, defendant filed a *pro se* motion alleging ineffective assistance of counsel. Defendant claimed defense counsel (1) failed to contact him regarding a plea deal, (2) failed to communicate with him during his case, (3) did not prepare a defense on count III, (4) allowed biased jurors to sit on the jury, and (5) did not have defendant's "best interest at heart." On September 16, 2014, counsel filed a motion for a new trial. On September 22, 2014, defendant filed a *pro se* motion for a new trial.

¶ 12 On October 3, 2014, the trial court denied counsel's posttrial motion. The court then addressed defendant's *pro se* motions, including posing questions to defense counsel and the prosecutor. Finding counsel's representation of defendant was "appropriate," the court decided no action needed to be taken on the motions. Thereafter, the court sentenced defendant to concurrent prison terms of 20 years on count IV and 15 years on count II.

¶ 13 On October 21, 2014, defense counsel filed a motion to reconsider the sentence. In December 2014, the trial court denied the motion. This appeal followed.

¶ 14 II. ANALYSIS

¶ 15 A. Sufficiency of the Evidence

¶ 16 Defendant argues the State's evidence was insufficient to sustain his conviction for aggravated battery with a firearm because Hogue's testimony showed that the gun discharged

only when he bumped defendant's arm, thereby negating both the mental state and the voluntary act necessary for a criminal offense. We disagree.

¶ 17 " 'When reviewing a challenge to the sufficiency of the evidence in a criminal case, the relevant inquiry is whether, when viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " *People v. Ngo*, 388 Ill. App. 3d 1048, 1052, 904 N.E.2d 98, 102 (2008) (quoting *People v. Singleton*, 367 Ill. App. 3d 182, 187, 854 N.E.2d 326, 331 (2006)). The trier of fact has the responsibility to determine the credibility of witnesses and the weight given to their testimony, to resolve conflicts in the evidence, and to draw reasonable inferences from that evidence. *People v. Jackson*, 232 Ill. 2d 246, 280-81, 903 N.E.2d 388, 406 (2009). "[A] reviewing court will not reverse a criminal conviction unless the evidence is so unreasonable, improbable or unsatisfactory as to create a reasonable doubt of the defendant's guilt." *People v. Rowell*, 229 Ill. 2d 82, 98, 890 N.E.2d 487, 496-97 (2008).

¶ 18 In this case, the State charged defendant with the offense of aggravated battery with a firearm. Under section 3.05(e)(1), (h) of the Criminal Code of 2012 (720 ILCS 5/12-3.05(e)(1), (h) (West 2012)), a person commits aggravated battery when, in committing a battery, he knowingly discharges a firearm and causes any injury to another person. Proof that the defendant committed a "voluntary act" is a material element of every criminal offense. 720 ILCS 5/4-1 (West 2012).

¶ 19 Defendant argues the evidence failed to establish beyond a reasonable doubt that he knowingly fired the gun. Relying on Hogue's testimony, he claims Hogue hit his arm, after which the gun went off. Thus, based on Hogue's testimony the gun discharged after he bumped defendant's arm, defendant argues the evidence does not establish he knowingly pulled the

trigger but describes a "reflexive, involuntary act."

¶ 20 We find that when viewing the evidence in the light most favorable to the State, the jury here could have found the elements of the offense beyond a reasonable doubt. Hogue never testified he hit defendant's arm. Instead, he stated he "may" have bumped into defendant's arm and that he "thought he might" have hit his arm. While Hogue testified the gun went off after he bumped defendant's arm, the jury could still conclude defendant voluntarily pulled the trigger. Moreover, there was no evidence or testimony that defendant accidentally pulled the trigger when his arm was hit. The jury could conclude defendant acted knowingly and intentionally, even if his arm was hit by Hogue. Defendant's claim he lacked the requisite intent and did not perform a voluntary act is nothing but speculation. Accordingly, the State's evidence supported the jury's verdict on the offense of aggravated battery with a firearm.

¶ 21 B. Posttrial Motions

¶ 22 Defendant argues the trial court failed to address several of his *pro se* allegations of ineffective assistance of counsel, thereby requiring remand for a full inquiry. We disagree.

¶ 23 When confronted with a defendant's posttrial allegations of ineffective assistance of counsel, our supreme court set out the procedural steps to follow in *People v. Moore*, 207 Ill. 2d 68, 797 N.E.2d 631 (2003) (noting the rule that had developed since *People v. Krankel*, 102 Ill. 2d 181, 464 N.E.2d 1045 (1984)).

> "New counsel is not automatically required in every case in which a defendant presents a *pro se* posttrial motion alleging ineffective assistance of counsel. Rather, when a defendant presents a *pro se* posttrial claim of ineffective assistance of counsel, the trial court should first examine the factual basis of the defendant's claim. If

> the trial court determines that the claim lacks merit or pertains only to matters of trial strategy, then the court need not appoint new counsel and may deny the *pro se* motion. However, if the allegations show possible neglect of the case, new counsel should be appointed." *Moore*, 207 Ill. 2d at 77-78, 797 N.E.2d at 637.

¶ 24 A court can conduct an inquiry into allegations counsel was ineffective by doing one or more of the following: "(1) questioning the trial counsel, (2) questioning the defendant, and (3) relying on its own knowledge of the trial counsel's performance in the trial." *People v. Peacock*, 359 Ill. App. 3d 326, 339, 833 N.E.2d 396, 407 (2005). "Where a defendant's claims are conclusory, misleading, or legally immaterial, or do not bring to the trial court's attention a colorable claim of ineffective assistance of counsel, the trial court may be excused from further inquiry." *People v. Bobo*, 375 Ill. App. 3d 966, 985, 874 N.E.2d 297, 315 (2007).

¶ 25 If the trial court makes a determination on the merits of defendant's claims, that determination will not be overturned on appeal unless it is manifestly erroneous. *People v. McCarter*, 385 Ill. App. 3d 919, 941, 897 N.E.2d 265, 285 (2008). " 'Manifest error' is error that is clearly plain, evident, and indisputable." *People v. Tolefree*, 2011 IL App (1st) 100689, ¶ 25, 960 N.E.2d 27.

¶ 26 In this case, defendant filed two *pro se* motions alleging ineffective assistance of counsel. In his first motion, defendant claimed counsel (1) failed to contact him regarding a plea deal or inform him about the trial date, (2) failed to communicate with him, (3) contributed to bias in the trial by allowing jurors to sit against defendant's objection, and (4) did not have his "best interest at heart." In his second motion, defendant also claimed counsel (1) did not call potential witnesses, (2) did not file motions to suppress evidence, and (3) failed to bring to the

trial court's attention that Hogue was under the influence of alcohol or drugs while testifying.

¶ 27 Defendant also filed a posttrial motion in which he alleged counsel was ineffective at trial, claiming counsel (1) failed to explain the charges to him; (2) failed to object to the introduction of new charges; (3) failed to object to Hogue's version of the events; (4) "blatantly ignored every single request, point, and issue that [defendant] brought to his attention"; (5) failed to discuss the new charges that were filed on the date of the trial; (6) failed to tell defendant about the State's plea offer until days before jury selection; (7) ignored defendant's concerns about a juror's bias; and (8) failed to participate in the preliminary hearing by questioning the witness.

¶ 28 At the hearing on defendant's motions, the trial court indicated there were issues that it "need[ed] some answers to." Upon questioning defense counsel about not calling potential witnesses, counsel stated the only witness discussed was defendant's girlfriend, who "would not have helped him." On the issue of a motion to suppress, counsel stated there was nothing to suppress. The court added "there were no statements, no conversations, [and] no searches." The court asked counsel about jury selection and which jurors to keep. Counsel stated they talked about "an African-American gentleman" and told defendant of his concern that he "didn't want African-Americans on the jury." On the issue of Hogue's alleged intoxication, the court stated "[t]he man sat next to me for 45 minutes and there was absolutely no indication that Mr. Hogue was in any way impaired." The court also addressed defendant's *pro se* motion for a new trial. The court asked the prosecutor about a confrontation involving a juror. The court concluded the hearing as follows:

> "The rest of it is Mr. Holt is questioning the veracity of Mr. Hogue and his other witness, and that's a question of credibility. The jury

> weighed the credibility of the witnesses, and they determined those witnesses to be credible. I don't believe there are any other issues that we need to deal with as far as his motions are concerned."

The docket entry indicates the court found counsel's representation of defendant was "appropriate."

¶ 29 Defendant argues the trial court failed to address every one of his claims and did not question him regarding those claims. However, the court presided over all phases of the jury trial and was familiar with the history of the entire case. Moreover, the hearing indicates the court was familiar with the allegations in defendant's motions, and several of the claims raised therein involved matters of trial strategy. There is no requirement the court must discuss every allegation on the record or specifically reject each allegation. While the court did not discuss the claims with defendant, it was not required to do so. Instead, the court could base its decision on counsel's answers and explanations, its own knowledge of counsel's performance, and the insufficiency of defendant's allegations on their face.

¶ 30 Defendant argues the trial court failed to acknowledge defense counsel's stated desire to exclude African-Americans from the jury. Defendant contends the court had a *sua sponte* duty to raise the issue of possible discrimination during *voir dire* pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986). However, "although a trial court has a *right* to raise *Batson* objections *sua sponte*, there is no corresponding *duty* to do so." (Emphases in original.) *People v. Rivera*, 348 Ill. App. 3d 168, 176, 810 N.E.2d 129, 136 (2004).

¶ 31 Here, defendant's allegations were insufficient to trigger a *Batson* inquiry of *voir dire* by the trial court. Defendant did not claim counsel was ineffective because he disregarded his objections to a juror or jurors. While counsel stated he discussed with defendant an African-

American male during jury selection and expressed his concern that counsel did not want any African-Americans on the jury, it does not indicate any African-American juror was excused based on that concern. Moreover, counsel went on to state the juror "didn't give any indication that he would not be fair and impartial," which tends to indicate the juror was not excused from service. The State points out the only juror excused by defense counsel was a juror who did not "believe in" guns. While counsel's statement about African-Americans on the jury is a matter of concern, there is nothing, in either defendant's allegations or the report of proceedings, to indicate purposeful discrimination that would require further inquiry by the court. Accordingly, we find none of defendant's stated allegations raise a colorable claim of ineffective assistance of counsel that would require a further *Krankel* hearing with different counsel.

¶ 32 C. Excessive Sentence

¶ 33 Defendant argues his 20-year sentence for the offense of aggravated battery with a firearm was excessive. We disagree.

¶ 34 In his first sentencing claim, defendant argues the trial court improperly relied on the fact that a firearm was involved in this case, a factor inherent in the offense, when it fashioned the 20-year sentence. The State contends defendant has forfeited his claim by failing to raise it in his motion to reconsider his sentence. In reply, defendant requests plain-error review.

¶ 35 "[S]entencing errors raised for the first time on appeal are reviewable as plain error if (1) the evidence was closely balanced or (2) the error was sufficiently grave that it deprived the defendant of a fair sentencing hearing." *People v. Ahlers*, 402 Ill. App. 3d 726, 734, 931 N.E.2d 1249, 1256 (2010). Under both prongs of the plain-error analysis, the burden of persuasion remains with the defendant. *People v. Wilmington*, 2013 IL 112938, ¶ 43, 983

N.E.2d 1015. As the first step in the analysis, we must determine whether any error occurred at all. *People v. Eppinger*, 2013 IL 114121, ¶ 19, 984 N.E.2d 475. "If error did occur, we then consider whether either prong of the plain-error doctrine has been satisfied." *People v. Sykes*, 2012 IL App (4th) 111110, ¶ 31, 972 N.E.2d 1272.

¶ 36 The question of whether the trial court relied on an improper factor in imposing the defendant's sentence presents a question of law, which we review *de novo*. *People v. Abdelhadi*, 2012 IL App (2d) 111053, ¶ 8, 973 N.E.2d 459. "It is well established that a factor inherent in the offense should not be considered as a factor in aggravation at sentencing." *People v. Canizalez-Cardena*, 2012 IL App (4th) 110720, ¶ 22, 979 N.E.2d 1014. Thus, a single factor cannot be used both as an element of the offense and as a basis for imposing a harsher sentence than would have been imposed without it. *People v. Phelps*, 211 Ill. 2d 1, 11-12, 809 N.E.2d 1214, 1220 (2004). "There is a strong presumption that the trial court based its sentencing determination on proper legal reasoning, and a court of review should consider the record as a whole, rather than focusing on a few words or statements by the trial court." *Canizalez-Cardena*, 2012 IL App (4th) 110720, ¶ 22, 979 N.E.2d 1014. The defendant has the burden "to affirmatively establish that the sentence was based on improper considerations." *People v. Dowding*, 388 Ill. App. 3d 936, 943, 904 N.E.2d 1022, 1028 (2009).

¶ 37 As stated, a person commits aggravated battery with a firearm when, in committing a battery, he knowingly discharges a firearm and causes any injury to another person. 720 ILCS 5/12-3.05(e)(1), (h) (West 2012). At the sentencing hearing, the trial court noted two statutory factors in aggravation, including defendant's criminal history and the need to deter others from committing the same type of offense. The court also stated, in part, as follows:

"When I look to the circumstances surrounding the offense,

it was apparent from the testimony of Mr. Hogue that when the gun was displayed, a weapon was displayed, and he—as he gestured to the jury, raised his arm, striking either [defendant's] arm or the weapon, that's when the weapon discharged. It was apparent from the jury's verdict of not guilty on attempted murder that [defendant] very likely didn't intend for the gun to go off. But the problem is when you present a firearm into a situation like that, you have to be responsible for the consequences. The gun did go off. It didn't hit Mr. [Hogue], he was probably struck by the recoil, and thought he had been shot, and blood running down his face, but fortunately he was not shot.

So [defendant], for whatever reason, introduced a weapon into this dispute over a fan, and it was discharged, and Mr. Hogue was injured.

There is, as I've indicated, some mitigation in this record, and the fact that [defendant] has managed to go some 12 years, and then only accumulating, after his domestic battery conviction, criminal damage, criminal damage, criminal damage, criminal trespass, possession of a small amount of cannabis, mostly crimes of annoyance, as opposed to crimes of violence. The court has to consider that, and as [defendant] sits here today, he's obviously an intelligent, articulate individual who has accomplished a lot in his life.

> But again, he introduced a weapon, a firearm into this dispute, and that is something that the court has to consider as a deterrent factor. I believe an appropriate sentence for the charge of aggravated battery, discharge of a firearm, it's a Class X offense. It will be for a period of 20 years in the Illinois Department of Corrections."

¶ 38 We find defendant has failed to establish the trial court improperly relied on a factor inherent in the offense when imposing the sentence. "The trial court is not required to refrain from any mention of the factors which constitute elements of an offense, and a mere reference to the existence of such a factor is not reversible error." *People v. Bowen*, 2015 IL App (1st) 132046, ¶ 50, 38 N.E.3d 98; see also *People v. Burge*, 254 Ill. App. 3d 85, 91, 626 N.E.2d 343, 347 (1993) (stating "every reference by the sentencing court to a factor implicit in the offense does not constitute reversible error"). Moreover, the court "may consider the nature and circumstances of the offense, including the nature and extent of each element of the offense committed by the defendant." *People v. Rennie*, 2014 IL App (3d) 130014, ¶ 29, 10 N.E.3d 994.

¶ 39 Here, the trial court did not rely on the mere fact that a gun was involved as a factor in aggravation. The court relied on two aggravating factors—defendant's criminal history and the need to deter others. While the court referenced defendant's use of a gun in this case, that is because defendant's use of a gun was a fact in the case. The court's remarks indicated it did not focus on the presence of the gun as an aggravating factor but instead focused on the facts and circumstances of the offense, including the manner in which the gun was used and the manner in which Hogue received his injuries. As we find no error occurred here, we do not address defendant's plain-error argument.

¶ 40 In his second argument, defendant contends the trial court's sentence failed to reflect significant mitigating evidence demonstrating his rehabilitative potential and the victim's statement urging the minimum sentence. The Illinois Constitution mandates "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11. " 'In determining an appropriate sentence, a defendant's history, character, and rehabilitative potential, along with the seriousness of the offense, the need to protect society, and the need for deterrence and punishment, must be equally weighed.' " *People v. Hestand*, 362 Ill. App. 3d 272, 281, 838 N.E.2d 318, 326 (2005) (quoting *People v. Hernandez*, 319 Ill. App. 3d 520, 529, 745 N.E.2d 673, 681 (2001)). "A defendant's rehabilitative potential and other mitigating factors are not entitled to greater weight than the seriousness of the offense." *People v. Pippen*, 324 Ill. App. 3d 649, 652, 756 N.E.2d 474, 477 (2001).

¶ 41 With excessive-sentence claims, this court has explained appellate review of a defendant's sentence as follows:

> "A trial court's sentencing determination must be based on the particular circumstances of each case, including factors such as the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age. [Citations.] Generally, the trial court is in a better position than a court of review to determine an appropriate sentence based upon the particular facts and circumstances of each individual case. [Citation.] Thus, the trial court is the proper forum for the determination of a defendant's sentence, and the trial court's

> decisions in regard to sentencing are entitled to great deference and weight. [Citation.] Absent an abuse of discretion by the trial court, a sentence may not be altered upon review." (Internal quotation marks omitted.) *People v. Price*, 2011 IL App (4th) 100311, ¶ 36, 958 N.E.2d 341 (quoting *People v. Hensley*, 354 Ill. App. 3d 224, 234-35, 819 N.E.2d 1274, 1284 (2004), quoting *People v. Kennedy*, 336 Ill. App. 3d 425, 433, 782 N.E.2d 864, 871 (2002)).

¶ 42 An abuse of discretion will not be found unless the court's sentencing decision is "fanciful, arbitrary, or unreasonable to the degree that no reasonable person would agree with it." *People v. Ramos*, 353 Ill. App. 3d 133, 137, 817 N.E.2d 1110, 1115 (2004). Also, an abuse of discretion will be found "where the sentence is 'greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense.' " *People v. Alexander*, 239 Ill. 2d 205, 212, 940 N.E.2d 1062, 1066 (2010) (quoting *People v. Stacey*, 193 Ill. 2d 203, 210, 737 N.E.2d 626, 629 (2000)).

¶ 43 Aggravated battery with a firearm is a Class X felony (720 ILCS 5/12-3.05(e)(1), (h) (West 2012)). A person convicted of a Class X felony is subject to a sentencing range of 6 to 30 years in prison. 730 ILCS 5/5-4.5-25(a) (West 2012). As the trial court's sentence of 20 years in prison was within the relevant sentencing range, we will not disturb the sentence absent an abuse of discretion.

¶ 44 At the sentencing hearing, the 36-year-old defendant pointed out he was gainfully employed, provided for his supportive family, and had furthered his education by taking classes toward an associate's degree. He also submitted eight letters presented on his behalf. On appeal,

he admits that, although he has a criminal record, he had "picked up only very minor cases" in recent years. Hogue also wrote a letter in support of defendant, asking the court to show leniency because defendant regretted the incident and "has the willingness to change." Hogue also stated he had no objection to the minimum sentence or a community-based sentence. Defendant argues this mitigating evidence demonstrates he has significant rehabilitative potential.

¶ 45 In fashioning the sentence, the trial court indicated it considered the letters in support of defendant. The court also considered Hogue's letter and stated "it's rare, if ever, that the court has seen a victim write a letter such as this." The court pointed out defendant received his general equivalency diploma and had worked as a barber. The court also noted defendant's criminal history and found any convictions within the previous 12 years were "basically misdemeanors."

¶ 46 At sentencing, "it is presumed a trial court considered all relevant mitigating and aggravating factors in fashioning a sentence, and that presumption will not be overcome absent explicit evidence from the record that the trial court failed to consider mitigating factors." *People v. Halerewicz*, 2013 IL App (4th) 120388, ¶ 43, 2 N.E.3d 333. Moreover, "[t]he existence of mitigating factors does not require the trial court to reduce a sentence from the maximum allowed." *Pippen*, 324 Ill. App. 3d at 652, 756 N.E.2d at 477. Here, the trial court's remarks clearly indicate it considered the mitigating factors in favor of defendant. Noting defendant's criminal history and the need to deter others, the court found a 20-year sentence was appropriate. We find no abuse of discretion.

¶ 47 D. Aggravated Discharge of a Firearm Conviction

¶ 48 Defendant argues his conviction for aggravated discharge of a firearm must be

vacated because it is based on the same physical act as his conviction for aggravated battery with a firearm. We agree, and the State concedes.

¶ 49 Defendant acknowledges he failed to raise this issue at trial or in a postsentencing motion and urges this court to review the matter under the plain-error doctrine. Our supreme court has held a violation of the one-act, one-crime rule results in a surplus conviction and sentence and affects the integrity of the judicial process, and thus, it satisfies the second prong of the plain-error rule. See *People v. Harvey*, 211 Ill. 2d 368, 389, 813 N.E.2d 181, 194 (2004).

¶ 50 In *People v. King*, 66 Ill. 2d 551, 566, 363 N.E.2d 838, 844 (1977), our supreme court declared a criminal defendant may not be convicted of multiple offenses when those offenses are all based on precisely the same physical act.

> "Decisions following *King* have explained that the one-act, one-crime doctrine involves a two-step analysis. *People v. Rodriguez*, 169 Ill. 2d 183, 186 (1996). First, the court must determine whether the defendant's conduct involved multiple acts or a single act. Multiple convictions are improper if they are based on precisely the same physical act. Second, if the conduct involved multiple acts, the court must determine whether any of the offenses are lesser-included offenses. If an offense is a lesser-included offense, multiple convictions are improper. *Rodriguez*, 169 Ill. 2d at 186." *People v. Miller*, 238 Ill. 2d 161, 165, 938 N.E.2d 498, 501 (2010).

¶ 51 In the case *sub judice*, the State charged defendant with aggravated discharge of a firearm, a Class 1 felony (720 ILCS 5/24-1.2(a)(2), (b) (West 2012)), alleging he knowingly

discharged a firearm in the direction of Hogue. The State also charged him with aggravated battery with a firearm, a Class X felony (720 ILCS 5/12-3.05(e)(1), (h) (West 2012)), alleging, in committing a battery, he knowingly and by means of the discharge of a firearm caused injury to Hogue in that he discharged the firearm in close proximity to Hogue, thereby causing injury.

¶ 52 Here, both convictions arose out of the same physical act, *i.e.*, the singular discharge of the firearm. As a single act was involved, multiple convictions were improper. "[I]f a defendant is convicted of two offenses based upon the same single physical act, the conviction for the less serious offense must be vacated." *People v. Johnson*, 237 Ill. 2d 81, 97, 927 N.E.2d 1179, 1189 (2010). Accordingly, the Class 1 felony offense of aggravated discharge of a firearm must be vacated here. We remand for the issuance of an amended judgment of sentence.

¶ 53 III. CONCLUSION

¶ 54 For the reasons stated, we affirm in part, vacate in part, and remand with directions. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 55 Affirmed in part and vacated in part; cause remanded with directions.